IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Kirsten F. Kelly, Presiding Judge

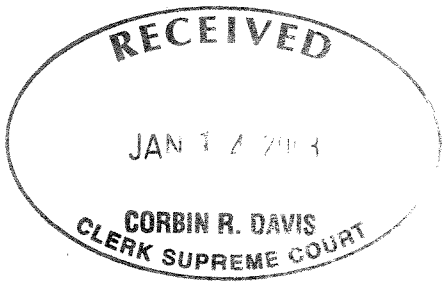
JOSEPH A. BARNOWSKY
Plaintiff-Appellee,

v

Docket No. 120768

GENERAL MOTORS CORPORATION
Defendant-Appellant.
_____/

BRIEF ON APPEAL - APPELLANT



Martin L. Critchell (P26310)
Counsel for Defendant-Appellant

1010 First National Building
Detroit, Michigan 48226
(313) 961-8690

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Plaintiff-appellee Barnowsky answers "No."

Defendant-appellant General Motors answers "Yes."

Court of Appeals did not answer.

Workers' Compensation Appellate Comm did not answer.

Board of Magistrates did not answer.

II

WHETHER THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 DESCRIBES *NEEDED* IN MCL 418.315(1); MSA 17.237(315)(1), FIRST SENTENCE, AS *NECESSARY TO CURE AS FAR AS REASONABLY POSSIBLE, AND RELIEVE FROM THE EFFECTS OF THE INJURY.*

Plaintiff-appellee Barnowsky answers "No."

Defendant-appellant General Motors answers "Yes."

Court of Appeals did not answer.

Workers' Compensation Appellate Comm did not answer.

Board of Magistrates did not answer.

III

WHETHER AND, IF SO, WHEN THE DUTY TO PAY MEDICAL EXPENSES FOR A MENTAL DISABILITY AROSE IN THIS CASE.

Plaintiff-appellee Barnowsky answers "Yes" and "From inception."

Defendant-appellant General Motors answers "No."

Court of Appeals answered "Yes" and "From inception."

Workers' Compensation Appellate Comm answered "No."

Board of Magistrates answered "Yes" and "From inception."

IV

WHETHER THE ORDER OF THE WORKERS' COMPENSATION APPELLATE COMMISSION IN *BARNOWSKY v GENERAL MOTORS CORP*, 1999 MICH ACO 2 BARRED THE BOARD OF MAGISTRATES FROM HEARING THE CLAIM THAT THE EMPLOYER PAY THE COSTS OF THE ATTENDANCE OR TREATMENT OF THE MENTAL DISABILITY OF THE EMPLOYEE.

Plaintiff-appellee Barnowsky answers "No."

Defendant-appellant General Motors answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "No."

STATEMENT OF FACTS

The Board of Magistrates (Board) ordered that defendant-appellant General Motors Corporation (Employer) pay plaintiff-appellee Joseph A. Barnowsky (Employee) **compensation at the rate of $397.00 from January 12, 1995**, and **reasonable and necessary treatment of [the] right wrist, subject to cost containment rules**. *Barnowsky v General Motors Corp*, unpublished order of the Board of Magistrates, entered on December 16, 1996 (Docket no. 121696049) (*Barnowsky* I Order) (7a) having the opinion that employment in December, 1994, for $621.88 per week had aggravated a carpal tunnel syndrome in the right wrist and a mental disability that were described in the *Application for mediation or hearing - Form A* (*Prior Application*) (1a). *Barnowsky v General Motors Corp*, unpublished opinion of the Board of Magistrates, entered on December 16, 1996 (Docket no. 121696049), slip op., 3-4 (*Barnowsky* I Opinion). (10a-11a)

On appeal by the Employer, the Workers' Compensation Appellate Commission (Commission) modified the rate of weekly workers' disability compensation that was decreed by the Board in the *Barnowsky* I Order to conform with the facts which were described in the *Barnowsky* I Opinion about the average weekly wage, the tax-filing status, and the dependents of the Employee when injured at work in December, 1994. *Barnowsky v General Motors Corp*, unpublished order of the Workers' Compensation Appellate Commission, entered on January 6, 1999 (Docket no. 97-0034) (*Barnowsky* II Order). (14a) *Barnowsky v General Motors Corp*, 1999 Mich ACO 2, 2, 5 (*Barnowsky* II Opinion). (15a, 17a) The Commission explicitly refused to consider an argument presented by the Employee to modify the *Barnowsky* I Order to include an order that the Employer pay for the costs of the care for the mental disability that was described in the *Barnowsky* I Opinion because the cross-appeal was filed out of time. *Barnowsky* II Opinion, 3, 5. (15a, 17a-18a)

After the *Barnowsky* II Order was final with the expiration of the time for filing an application for leave to appeal with the Court of Appeals, the Employee filed another

application for mediation or hearing with the Board claiming that the Employer was responsible for the costs of the care that was provided by Dr. Richard Atkins who was a psychiatrist providing regular care after December, 1994 (3a-4a, 5a-6a) and a penalty. *Application for mediation or hearing*, 1, 2. (*Subsequent Application*) (19a, 20a) The Employer appeared and contested this because the medical care for the carpal tunnel syndrome in the right wrist was paid in-full and on-time as required by the *Barnowsky* I Order and the medical care for the mental disability was not allowed by the *Barnowsky* I Order.

The Board amended the order entered in the *Barnowsky* I Order to include **reasonable and necessary treatment of [the] emotional condition subject to cost containment rules** but denied a penalty, *Barnowsky v General Motors Corp*, unpublished order of the Board of Magistrates, entered on March 30, 2000 (Docket no. 033000031) (*Barnowsky* III Order) (21a), having *fully intended to order [this] and had inadvertently neglected to do so* in the *Barnowsky* I Order. *Barnowsky v General Motors Corp*, unpublished opinion of the Board of Magistrates, entered on March 30, 2000 (Docket no. 033000031), slip op., 2 (*Barnowsky* III Opinion). (23a)

The Commission reversed the *Barnowsky* III Order, *Barnowsky v General Motors Corp*, unpublished order of the Workers' Compensation Appellate Commission, entered on November 2, 2000 (Docket no. 00-0183) (*Barnowsky* IV Order) (24a), because the *Barnowsky* I Order was final on the subject of the category of medical care which the Employer must pay having been affirmed in the *Barnowsky* II Order. *Barnowsky v General Motors Corp*, 2000 Mich ACO 2214, 2215 (*Barnowsky* IV Opinion). (26a)

The Court of Appeals granted leave to appeal, *Barnowsky v General Motors Corp*, unpublished order of the Court of Appeals, decided on February 13, 2001 (Docket no. 231169) (27a), and reversed the *Barnowsky* IV Order. *Barnowsky v General*

Motors Corp, unpublished opinion of the Court of Appeals, decided on December 21, 2001 (Docket no. 231169) (*Barnowsky* V). (28a)

The Court granted leave to appeal and directed briefing of "(1) how the words 'reasonable' and 'needed' should be construed in MCL 418.315(1); (2) whether and, if so, when the duty to pay medical expenses for a mental disability arose in this case; and (3) whether [the Employee's] claim is barred by res judicata." *Barnowsky v General Motors Corp*, 467 Mich 898; - NW2d - (2002). (36a)

ARGUMENT

I

THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 DESCRIBES *REASONABLE* IN MCL 418.315(1); MSA 17.237(315)(1), FIRST SENTENCE, AS *RECOGNIZED BY THE LAWS OF THIS STATE AS LEGAL.*

The idea that a word or phrase defines another word or phrase can be conveyed by a linking verb such as **means**, **considered**, **constitute**, **presumed**, **includes**, and **including** which engage the idea of equivalency. Which linking verb is used requires a different method of exposition. A statute may define one word or phrase by using **means** as a linking verb to another word or phrase which is the complement of the subject. For example, a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq., defines **disability** as **a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease** by using **means** as a linking verb. MCL 418.301(4); MSA 17.237(301)(4). Section 301(4), first sentence, states that, "[a]s used in this chapter, 'disability' **means** a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." (emphasis supplied)

When a statute uses **means** as a linking verb, the definition of the subject in the sentence is the complement that requires exposition from the common and approved use

of the words and phrases there. *Twp of Leoni v Taylor*, 20 Mich 148 (1820). *Sun Valley Foods v Ward*, 460 Mich 230; 596 NW2d 119 (1999). In the case of *Twp of Leoni, supra*, 154-155, the Court held that, "[w]hen the meaning of the words is plain and obvious, the only safe recourse is to suppose the [intention] of those things which the words denote, and abstain from all attempts to discover a different meaning by suppositions and conjectures."

The Court actually engaged this process in the case of *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002) to explicate section 301(4), first sentence. There, the Court recognized that the linking verb **means** in section 301(4), first sentence, directed all of the attention to the complement **a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease** and required an exposition of the common and approved use of those words to understand the meaning of the subject **disability**. In the case of *Sington, supra*, 155, the Court said that,

> "[w]e begin our analysis with the definition of 'disability' in the WDCA:
>
> > As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. [MCL 418.301(4).]
>
> As this language plainly expresses, a 'disability' is, in relevant part, a limitation in 'wage earning capacity' in work suitable to an employee's qualifications and training. The pertinent definition of 'capacity' in a common dictionary is 'maximum output or producing ability.' *Webster's New World Dictionary* (3d College ed). Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training.
>
> So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position

> suitable to his qualifications and training would not constitute a disability."

A statute may define a word or phrase by using **considered** or **constitute** as a linking verb to another word or phrase which is the complement of the subject. For example, a statute in the WDCA describes the **loss of a hand** as **an amputation between the elbow and wrist that is 6 or more inches below the elbow** by using **considered** as a linking verb. MCL 418.361(2)(h), (i); MSA 17.237(361)(2)(h), (i). Section 361(2)(h), (i) states that,

> "[i]n cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> * * *
>
> Hand, 215 weeks.
> Arm, 269 weeks.
>
> An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be **considered** a hand, and an amputation above that point shall be considered an arm." (emphasis supplied)

A statute in the WDCA describes the **loss of an eye** as **eighty percent loss of vision of 1 eye** by using **constitute** as a linking verb. MCL 418.361(2)(l); MSA 17.237(361)(2)(l). Section 361(2)(l) states that,

> "[i]n cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> * * *
>
> Eye, 162 weeks.
>
> Eighty percent loss of vision of 1 eye shall **constitute** the total loss of that eye." (emphasis supplied)

Statutes which use **considered** and **constitute** as a linking verb differ from those statutes which use **means** because the subject of the sentence is invariably a concrete noun that can be described by quantity and not an abstract noun that cannot be sensibly described by quantity. For example, the subject of section 361(2)(i) is **hand** which is a concrete noun that can be described by the quantity of distance in inches from a particular place. This makes **considered** an appropriate linking verb. The subject of section 361(2)(l) is **eye** which is also a concrete noun that can be described by the amount of light refraction. This makes **constitute** an appropriate linking verb. The subject of section 301(4), first sentence, is **disability** which is not a concrete noun. **Disability** is an abstract noun that cannot be sensibly described by a measurable quantity of space, mass, or time which makes **means** the appropriate linking verb to the complement **a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease.**

When a statute uses **considered** or **constitutes** as a linking verb, the appreciation of the subject of the sentence does not require any exposition of the words and phrases of the complement which are well known units of space such as distance in inches, mass such as weight in pounds, or time such as weeks. This is why there are no cases from the Court that explain a word or phrase in the complement of section 361(2)(i), **an amputation between the elbow and wrist that is 6 or more inches below the elbow**, while there have been many cases from the Court to explain a word or phrase in the complement of section 301(4), first sentence, **a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease.** Instead, when **considered** or **constitutes** are linking verbs, the subject of the sentence has been established from the context of the particular statute. For example, the Court considered the context of section 361(2)(l) in the case of *Lindsay v Glennie Industries, Inc*, 379 Mich 573; 153 NW2d 642 (1967) to decide when or how the

loss of vision of an eye could be determined. The Court held in the case of *Lindsay, supra,* 578,

> "[w]e treat this case as one of first impression. We hold the surgical removal of the natural lens made necessary by an injury arising out of and in the course of claimant's employment is loss of an eye within the meaning of the amended statute.
>
> We recognize that substituting an artificial lens has 'restored' vision to the otherwise sightless eye. We point out that a specific loss award is not made as compensation for diminution of use of the involved organ or member. It is not awarded to compensate for loss of earnings or earning capacity. It is awarded irrespective of either fact or both. If ophthalmological advances and refinements in the use of contact lens has in fact rendered the amended statute inconsonant with its original legislative intent, it is the province of the legislature to say so."

See also: *Cain v Waste Mgt, Inc,* 465 Mich 509, 521-522; 638 NW2d 98 (2002),

> ". . . the WCAC included this analysis, which we adopt as our own:
>
> > We believe that *the historical distinction* repeatedly recognized by the appellate courts throughout the long interpretational history of the two statutory provisions continues to provide an important divider between the specific loss entitlements and the total and permanent disability entitlements established under the statute." (emphasis supplied)

A statute may define a word or phrase by using **presumed** as a linking verb to another word or phrase as a complement of the subject. This usually occurs with a *conclusive presumption.* A fact which is conclusively presumed by a statute is not a rule of evidence but, instead, a description by law of a fact by another fact. *Nebus v Wein,* 301 Mich 293; 3 NW2d 280 (1942). *Pearo v City of Mackinac Island,* 307 Mich 290; 11 NW2d 893 (1943). In the case of *Pearo, supra,* 293-294, the Court observed that,

> ". . . an ordinary presumption [is] subject to being overcome by testimony to the contrary, and there is such testimony in the record. But as a conclusive presumption provided by the statute, it could not be contradicted by testimony. Instead it remained as an established phase of the case for the benefit of and in favor of plaintiff. *Hanshaw* v. *City of Port Huron,* 265 Mich. 84. As being somewhat in this field of the law, see, also, *Handy* v. *Township of Meridian,* 114 Mich. 454.

> If, in a case of this character, there is no dispute in the proofs as to the defect having existed for a period of 30 days or longer prior to the accident, the court should charge the jury as a matter of law that there is a *conclusive* presumption of notice of the defect and of a reasonable time in which to repair . . ." (emphasis by the Court)

Statutes in the WDCA use **conclusively presumed** as a linking verbal phrase to define a word. MCL 418.331(a), (b); MSA 17.237(331)(a), (b). MCL 418.353(1)(a)(i), (ii); MSA 17.237(353)(1)(a)(i), (ii). MCL 418.521(1); MSA 17.237(521)(1). Section 331(a) and section 331(b), first sentence, uses **conclusively presumed** as a linking verbal phrase to define the subject **wife** and **child under the age of 16** as a **dependent.** Specifically, these two laws state that,

> "[t]he following persons shall be **conclusively presumed** to be wholly dependent for support upon a deceased employee:
>
> A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, a worker's compensation magistrate shall find the wife was living apart for justifiable cause or because he had deserted her."

and

> "[a] child under the age of 16 years . . ."

Section 521(1) also uses **conclusively presumed** as a linking verbal phrase to define one kind of disability which is commonly known as total and permanent disability by stating that,

> "[i]f an employee has a permanent disability in the form of the loss of a hand, arm, foot, leg or eye and subsequently has an injury arising out of and in the course of his employment which results in another permanent disability in the form of the loss of a hand, arm, foot, leg or eye, at the conclusion of payments made for the second permanent disability he shall be **conclusively presumed** to be totally and permanently disabled and paid compensation for total and permanent disability after subtracting the number of weeks of compensation received by the employee for both such losses. The payment of compensation under this section shall be made by the second injury fund, and shall begin at the conclusion of the payments for the second permanent disability." (emphasis supplied)

When a statute uses **conclusively presumed** to describe a word or phrase, exposition is from the particular statutes and not from the common and approved use of the word which is the subject of the sentence. MCL 8.3a; MSA 2.212(1). This statute requires that, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be . . . understood according to such peculiar and appropriate meaning."

This means that **wife** in section 331(a) and **loss of a hand, arm, foot, leg, or eye** must be understood as described by law whether outside the WDCA such as MCL 551.2; MSA 25.2 that defines marriage as a solemnized contract or within the WDCA such as section 361(2)(h), (i) that defines **hand**.

The problem with **conclusively presumed** as a linking verbal phrase to define the subject of a statute has been with the proximity between the subject and complement. For example, the Court invalidated use of **conclusively presumed** as a linking verbal phrase to define the subject of **dependent** in the case of *Day v W A Foote Memorial Hosp*, 412 Mich 698; 316 NW2d 712 (1982) because of the breach between the subject **dependent** and the complement **wife** in section 331(a) but was untroubled by the use of **conclusively presumed** as a linking verb to define the other complement of **child under the age of 16** because of the close proximity between those two.

Presumed may be a linking verb to describe a word or phrase in a statute. For example, a statute in the WDCA describes **disability** with **presumed** as a linking verb. MCL 418.373(1); MSA 17.237(373)(1). Section 373(1) states that,

> "[a]n employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 U.S.C. 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be **presumed** not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the

> employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4." (emphasis supplied)

In the case of *White v General Motors Corp*, 431 Mich 387; 429 NW2d 576 (1988), the Court aptly recognized that **presumed** was a linking verb to describe a word or phrase which was the subject of the sentence, **disability**, from a complement, **unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience**. *White, supra*, 392, 393. There, the Court held that, "analysis of this section reveals that it is not procedural" and "Section 373 does not shift the [employee's] burden of producing evidence. Therefore, it does not create a 'presumption.'"

While not expressed by the Court in *White, supra*, the unusual use of **presumed** as a linking verb to define the subject of **disability** was accurate because section 373(1), last sentence, pronounces the presumption as a standard of disability.

A statute may define a word or phrase by using **includes** or **including** as linking verbs to the subject. For example, a statute in the WDCA defines **an employee** as **the person injured, personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee** by using **includes** as a linking verb. MCL 418.131(2); MSA 17.237(131)(2). Section 131(2) states that,

> "[a]s used in this section and section 827, 'employee' **includes** the person injured, his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and 'employer' includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract." (emphasis added)

Another statute in the WDCA describes **conditions of the aging process** as **heart and cardiovascular conditions** by using **including** as the linking verb.

MCL 418.301(2); MSA 17.237(301)(2). Section 301(2), first sentence, states that, "[m]ental disabilities and conditions of the aging process, **including** but not limited to heart and cardiovascular conditions, shall be compensable, if contributed to or aggravated or accelerated by the employment in a significant manner." (emphasis supplied)

Includes and **including** as linking verbs to define a subject in a statute require very different functions for the Court. **Includes** prohibits the Court from changing the list at all because use of the present tense denotes an exclusive listing which cannot be enlarged or reduced by the rule of expression of one implies the exclusion of all others. *Sebewaing Industries, Inc v Village of Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953). In the case of *Hesse v Ashland Oil Co*, 466 Mich 21; 642 NW2d 330 (2002), the Court applied this principle when refusing to redact the definition of **an employee** by section 131(2) which employs **includes** as a linking verb. The Court said in the case of *Hesse, supra*, 30, that,

> ". . . empathy for plaintiffs does not justify this Court ignoring the plain language of MCL 418.131, which bars the imposition of liability on defendant in the present circumstances. It could be argued, as undoubtedly it has been before the Legislature, that the law should allow a cause of action under circumstances like those in this case. Yet, as Justices SMITH and O'HARA and the many others on this Court who have written or signed opinions to a similar effect have understood, this is a policy matter—which is to say, it is not this Court's choice to make. Rather, we, as judges, must apply the legislation as it is written."

Including actually requires an active role for the Court because the gerund form signals a non-exclusive list which *must be* supplemented by the rule of noscitur a sociis. *Tyler v Livonia Pub Schs*, 459 Mich 382; 590 NW2d 560 (1999).

The idea that a word or phrase defines another word or phrase can be conveyed by conjunctions such as **such as** and **or other** which engage the idea of description rather than equivalency. Use of conjunction to define by description is very old and involves a particular method of exposition. *The Archbishop of Canterbury's Case*, 2 Co Rep 46a; 76 Eng Repr 519 (1596).

A statute in the WDCA defines **attendance or treatment recognized by the laws of this state as legal** with just this use of the conjunction **or other**. MCL 418.315(1); MSA 17.237(315)(1). Section 315(1), first sentence, states that,

> "[t]he employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, **or other** attendance or treatment recognized by the laws of this state as legal, when they are needed." (emphasis supplied)

The conjunction **or other** in section 315(1), first sentence, readily signals that the subject **attendance or treatment recognized by the laws of this state as legal** is defined by the list of particular examples **reasonable medical, surgical, and hospital services and medicines**. This has two consequences for any exposition of section 315(1), first sentence. One, the list of the particular items **reasonable medical, surgical, and hospital services and medicines** are themselves particular kinds of **attendance or treatment recognized by the laws of this state as legal**. The Court cannot delete any one of the particular items that are listed.

The other consequence is that the use of the conjunction **or other** requires the Court to consider adding other particular items to the existing list in reference to the character of the particular items **reasonable medical, surgical, and hospital services and medicines**. This process of exposition is a variant of noscitur a sociis which is commonly known as ejusdem generis and sometimes called Lord Tenterden's Rule. *Roberts v City of Detroit*, 102 Mich 64; 60 NW 450 (1894). *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981).

The question in this case concerns understanding the particular items which are listed as kinds of attendance or treatment. This case does not involve adding some unlisted care as **attendance or treatment recognized by the laws of this state as legal** by referencing the quiddity of the particular items that are listed **reasonable medical, surgical, and hospital services and medicines** with the rule of ejusdem generis.

Understanding that the particular items which are listed are species of the generic term because of the conjunction **or other** establishes the meaning of the particular items. That is, the idea of defining the generic term of **attendance or treatment recognized by the laws of this state as legal** with the description from the list of the particular kinds of care of **reasonable medical, surgical, and hospital services and medicines** also establishes the idea of defining the particular kinds of care by equivalency with the generic term. That is, the particular kinds of care that are listed in section 315(1), first sentence, of **reasonable medical, surgical, and hospital services and medicines** are the equivalents of the generic term **attendance or treatment recognized by the laws of this state as legal** because of the conjunction **or other**.

This means that the listed nouns **medical, surgical, and hospital services and medicines** are particular equivalents and described by the generic term **attendance or treatment** AND that the adjective of the listed nouns **reasonable** is a particular equivalent and described by the adjective of the generic term **recognized by the laws of this state as legal**.

Reasonable in section 315(1), first sentence, cannot be understood to be different from **recognized by the laws of this state as legal** without changing the character of the listed items of **medical, surgical, and hospital services and medicines** as particular species of the generic term **attendance or treatment** which would deny the meaning of the conjunction **or other**.

That **reasonable** is synonymous with **recognized by the laws of this state as legal** is consonant with other law. Section 315(1), second and third sentences, add to the list of the particular kinds of care which can be had by an injured employee. These species of **attendance or treatment** must be recognized by the laws of this state as legal as section 315(1), second and third sentences, state that,

> ". . . an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service

> was included in the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, MCL 333.17401, as of May 20, 1992. An employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998." Section 315(1), second and third sentences.

Reasonable cannot define the cost of care because the cost for care is defined by a comprehensive set of administrative rules that are commonly known as the medical care cost containment rules which were promulgated by another statute in the WDCA. MCL 418.315(2); MSA 17.237(315)(2). The Court failed to recognize this when deciding the case of *Kosiel v Arrow Liquors Corp*, 446 Mich 374; 521 NW2d 531 (1994).

In *Kosiel, supra*, 382-383, the Court thought **reasonable** meant **cost** by stating that,

> ". . . the statute requires the employer to bear the cost of *reasonable* medical services, or other attendance or treatment of a qualified employee. The temporal language utilized by the hearing referee to the effect that plaintiff's husband shall be compensated a sum certain 'until the further order' dovetails harmoniously with the statutory mandate that plaintiff be provided with 'reasonable' medical services 'when they are needed.'
>
> Indeed, neither the wording of the order nor the statute is restrictive; neither forecloses a redetermination of the amount of nursing care benefits or conditions modification on specific factors. The furnished services must be 'reasonable' not only in terms of function *but also in terms of the compensation paid to the provider of such services*. Like the statutory standard, the order provides the necessary flexibility to allow a future determination of 'reasonableness' in keeping with the humanitarian objectives that underlie the WDCA." (first emphasis by the Court; second emphasis supplied)

The ruling of the Court in *Kosiel, supra*, that **reasonable** in section 315(1), first sentence, relates to the **cost** of care must be reversed as inconsistent with the plain text of both section 315(1), first sentence, which establishes **reasonable** as **recognized by the laws of this state as legal** and section 315(2) which

establishes a comprehensive set of rules for the cost of any care which is shown to be **reasonable medical, surgical, and hospital services and medicines**. *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002). *Sington, supra*. *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002).

Reasonable cannot define the time which **medical, surgical, and hospital services and medicines** may be available to an individual because the time that any **reasonable medical, surgical, and hospital services and medicines** is available is defined by another provision of section 315(1), first sentence. In particular, the time that any care may be available is defined by section 315(1), first sentence, as **when they are needed**.

Resort to a dictionary or other external resource to understand **reasonable** is not needed because section 315(1), first sentence, provides a definition by using the conjunction **or other**. Section 315(1), first sentence, does not use **means** as a linking verb to define a word which is the usual occasion for referring to a dictionary. See, e.g., *Sington, supra*.

In this case, the care received was **reasonable medical services and medicine** because the care was **recognized by the laws of this state as legal** having been provided by licensed professionals in the fields of medicine and psychology that are recognized by the Public Health Code. MCL 333.17001(d); MSA 14.15(17001)(1)(d). MCL 333.18101; MSA 14.15(1801), et seq.

The requirement that all attendance or treatment must be **recognized by the laws of this state as legal** requires reversing *Kushay v Sexton Dairy Co*, 394 Mich 69; 228 NW2d 205 (1975). In the case of *Kushay, supra*, the Court held that the status of a provider of care was not important. Specifically, the Court held that,

> "[t]he language of the statute, 'reasonable medical, surgical and hospital services and medicines or other attendance or treatment', focuses on the nature of the service provided, not the status or devotion of the provider of the service. Under the statute, the employer bears the cost of medical services, other attendance and treatment. If services within the statutory

> intendment are provided by a spouse, the employer is obligated to pay for them.
>
> Ordinary household tasks are not within the statutory intendment. House cleaning, preparation of meals and washing and mending of clothes, services required for the maintenance of persons who are not disabled, are beyond the scope of the obligation imposed on the employer. Servicing meals in bed and bathing, dressing, and escorting a disabled person are not ordinary household tasks. That a 'conscientious' spouse may in fact perform these services does not diminish the employer's duty to compensate him or her as the person who discharges the employer's duty to provide them." *Kushay, supra*, 74.

This pronouncement expunged the text **recognized by the laws of this state as legal** in section 315(1), first sentence. The text **recognized by the laws of this state as legal** requires that the provider of any kind of **attendance or treatment** have specific qualification and approval by law to render the kind of care sought by the injured employee. This protects the injured employee. A person who is not licensed to provide a kind of care recognized by the Public Health Code is effectively barred from practicing on injured employee-patients. The view of *Kushay, supra*, that an unqualified and unlicensed provider can nonetheless practice medicine on an injured employee-patient defies the text of the WDCA which incorporates the protection of the Public Health Code with the explicit and quite unavoidable text in section 315(1), first sentence, **recognized by the laws of this state as legal**.

The jurisprudence of *Kushay, supra*, is also faulty by referring to the views of a commentator, *Kushay, supra*, 75, instead of the actual text and the grammar of the statute.

II

THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 DESCRIBES *NEEDED* IN MCL 418.315(1); MSA 17.237(315)(1), FIRST SENTENCE, AS *NECESSARY TO CURE AS FAR AS REASONABLY POSSIBLE, AND RELIEVE FROM THE EFFECTS OF THE INJURY.*

The idea of time can be conveyed by naming a date, by naming a number of units of time from a particular event, and by using the adverb **when**. *Toy ex rel Elliot v Voelker*, 273 Mich 205, 220; 262 NW 881 (1935).

Statutes in the WDCA convey the idea of time by naming a date. MCL 418.301(12); MSA 17.237(301)(12). Section 315(1), third sentence. MCL 418.352(4); MSA 17.237(352)(4). Section 301(12) states that, "[t]his section shall apply to personal injuries and work related diseases occurring on and after **June 30, 1985**." (emphasis supplied) Section 315(1), third sentence, states that, "[a]n employer is not required to reimburse . . . charges for services performed by a profession that was not licensed or registered by the laws of this state on or before **January 1, 1998**, but that becomes licensed, registered or otherwise recognized by the laws of this state after **January 1, 1998**." (emphasis supplied) Section 352(4) states that, "[a]ll personal injuries found compensable under this act after the effective date of this section with a personal injury date **before January 1, 1980**, shall be paid at a rate pursuant to this section." (emphasis supplied)

Statutes in the WDCA convey the time by naming a number of units of time such as days or weeks from a particular event. MCL 418.222(1); MSA 17.237(222)(1). MCL 418.861a(5); MSA 17.237(861a)(5). Section 222(1), second sentence, states that, "**[w]ithin 30 days** of receiving a completed application for mediation or hearing from the bureau, the carrier shall file a written response . . ." (emphasis supplied) Section 861a(5), first sentence, states that,

> "[a] party filing a claim for review under section 859a shall file a copy of the transcript of the hearing **within 60 days of filing the claim for review** and shall file its brief with the commission and provide any opposing party with a copy of the transcript and its brief **not more than 30 days after filing the transcript**." (emphasis supplied)

A statute in the WDCA conveys time with the adjective **when**. Section 315(1), first sentence. Section 315(1), first sentence, states that,

> "[t]he employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, **when** they are needed." (emphasis supplied)

When is an adjective of time. *Toy ex rel Elliot, supra*. In the case of *Toy ex rel Elliot, supra*, 220, the Court observed that,

> "'[w]hen' has no fixed meaning. It is an adverb of time. The ordinary meaning is 'at the time of' or 'after,' according to the context. 68 C.J. p. 244. Because of the difficulty or impossibility of doing two acts at once, and as the law does not deal in split seconds of time, the word is to be given a sensible construction in the law, as to the time of doing the acts, and sometimes it may mean a 'reasonable time after.' It does not mean 'before.' To give it the effect of 'before' in the above statute plainly is unnatural and inadmissible because it is used to designate the time at which the duty to give the bond arises."

By conveying the idea of time, **when** creates the circumstance which must occur before another may occur. That circumstance or preceding condition is always

sentence. Also divorcing the word **needed** from the word **reasonable** is that **needed** relates the adverb **when** while **reasonable** is an *adjective* of the nouns **medical, surgical, and hospital services and medicines**.

Also, **when** conveys the idea of the duration of the benefit which is described in the main clause. The duration is the duration of need. This can be best appreciated by the statute which it changed. The prior description of the duration of **reasonable medical, surgical, hospital services and medicines, or other attendance and treatment recognized by the laws of this state as legal** was six months after the personal injury which could be enlarged by three successive six month periods. *Lahti v Fosterling*, 357 Mich 578, 582-583; 99 NW2d 490 (1959). **Needed** retained the idea of time but effected a change from a specific length of time to an indefinite length of time.

Needed in section 315(1), first sentence, means **needed to cure, so far as reasonably possible, and relieve from the effects of the injury** because of section 315(1), eighth sentence, which may be considered by the Court because of the principle of noscitur a sociis. *Tyler, supra*. *Brown v Genessee Co Bd of Comm'rs (After Remand)*, 464 Mich 430; 628 NW2d 471 (2001). *People v Vasquez*, 465 Mich 83; 631 NW2d 711 (2001). *Koontz v Ameritech Services, Inc*, 466 Mich 304; 645 NW2d 34 (2002). In the case of *Tyler, supra*, 390-391, the Court held that,

> "[c]ontextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting. *State ex el Wayne Co Prosecutor v Diversified Theatrical Corp*, 396 Mich 244, 249; 240 NW2d 460 (1976), quoting *People v Goldman*, 7 Ill App 3d 253, 255; 287 NE2d 177 (1972).[9]
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> * * *

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[9] United States Supreme Court Justice Antonin Scalia has clarified the meaning of this rule by the example he uses in his recent book, *A Matter of Interpretation*. We repeat it here: 'If you tell me, 'I took the boat out on the bay,' I understand 'bay'

to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else.' (Princeton, New Jersey: Princeton University Press, 1997), p 26."

Section 315(1), eighth sentence, describes the durable goods which may be available as a benefit after a personal injury by stating that, "[t]he employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury."

Section 315(1), eighth sentence, is an associated statute because of the word **also**. The durable goods which are listed are the adjunct to the consumable services and goods (medicines) which are listed in section 315(1), first sentence.

Section 315(1), eighth sentence, is also an associated statute by having the same imperative. Section 315(1), eighth sentence, refers to **necessary** while section 315(1), first sentence, refers to **needed**.

Finally, section 315(1), eighth sentence, simply completes the idea about the goal or purpose of the need which is implicit in section 315(1), first sentence. Section 315(1), first sentence, makes good sense by expressing the goal or purpose as **when they are needed *to cure, so far as reasonably possible, and relieve from the effects of the injury***.

III

THE EMPLOYER NEVER HAD A DUTY TO PAY THE COSTS OF THE ATTENDANCE OR TREATMENT FOR THE MENTAL DISABILITY OF THE EMPLOYEE BECAUSE OF THE ORDER OF THE WORKERS' COMPENSATION APPELLATE COMMISSION IN *BARNOWSKY v GENERAL MOTORS CORP*, 1999 MICH ACO 2.

An employer cannot impose **attendance or treatment** on an employee. *Blackwell v Citizens Ins Co of America*, 457 Mich 662; 579 NW2d 889 (1998). In the case of *Blackwell, supra*, 669-670, 670-671, the Court accurately observed that an employer

could not impose any kind of **attendance or treatment** that could be primary compensation available by the terms of section 315(1), first sentence,

> "[t]he [injured employee's] right to choose the provider is subject only to the employer's and carrier's option to petition the worker's compensation bureau for resolution of a dispute if either is dissatisfied with the [injured employee's] choice. *Id.* Implicit in a carrier's duty under the WDCA to pay for reasonable medical treatment and its right to object to a [injured employee's] choice of provider is its ability to refer the [injured employee] to a particular provider or recommend that a [injured employee] gets a second opinion. That the WDCA *permits* a carrier to undertake such actions does not impose any *duty* on it to do so.
>
> Case law development acknowledges this active role for [injured employees], with carriers generally becoming active only when dissatisfied with a [injured employee's] choices." (citations omitted)
>
> * * *
>
> ". . . it is repugnant to the existing policy of this state to strip from the injured person the ability to determine which of differing courses of medical treatment to follow and to pass such authority to claims representative of a worker's compensation carrier. However, a claimant's freedom to make treatment choices, like any freedom, is subject to mishandling and poor judgment and may result in unfortunate injuries as occurred here. Yet the remedy plaintiff proposes, which would strip away an injured claimant's ability to select among treatment options and give authority over treatment to the bureaucracy of an insurance company, has never been part of the WDCA, has never been endorsed in our case law explicating that act."

Also, the voluntary payment of **attendance or treatment** does not establish the fulfillment of a responsibility. MCL 418.831; MSA 17.237(831). Section 831 states that "[n]either the payment of compensation or the accepting of the same by the employee . . . shall be considered as a determination of the rights of the parties."

What *does* establish and start the obligation or duty is an order by the Board to pay compensation which starts when a decree is entered and final with the expiration of the time for any appeal. Section 315(1), ninth sentence, explicitly starts the duty of an employer to pay **attendance or treatment** from the time of a decree of the Board by stating

that, "[i]f the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, *by order of the Board.*" (emphasis supplied)

MCL 418.801(3); MSA 17.237(801)(3) confirms that the duty occurs only when the Board enters an order by allowing a penalty only for the failure of an employer to pay the costs of medical services and medicines after the Board entered an order ending any disputes about the responsibility to the employee. *Charpentier v Canteen Corp*, 105 Mich App 700; 307 NW2d 704 (1981), lv den 412 Mich 887 (1981).

In this case, there was never a duty to pay for the costs of the medical services which were rendered by Richard Atkins, who was a psychiatrist providing medicines for the Employee (5a-6a), or by Peter Keelin, who was a psychologist providing counseling (4a, 5a) because the Employer was never ordered to provide this care. Indeed, the Commission established that the Employer was free of all responsibility for the costs of the care for any mental or emotional problem regardless of the individual provider by rejecting the claim which was presented by the Employee, *Barnowsky* II Opinion, slip op., 4 (18a) and entering an order effecting that. *Barnowsky* II Order. (14a) The *Barnowsky* II Order was final because the Employee did not appeal to the Court of Appeals within thirty days. MCL 418.861a(14); MSA 17.237(861a)(14). *Bellamy v Arrow Overall Supply Co*, 171 Mich App 310; 429 NW2d 884 (1988).

IV

THE ORDER OF THE WORKERS' COMPENSATION APPELLATE COMMISSION IN *BARNOWSKY v GENERAL MOTORS CORP*, 1999 MICH ACO 2 BARRED THE BOARD OF MAGISTRATES FROM HEARING THE CLAIM THAT THE EMPLOYER PAY THE COSTS OF THE ATTENDANCE OR TREATMENT OF THE MENTAL DISABILITY OF THE EMPLOYEE.

Particular statutes in the WDCA allow two ways for changing any order entered by the Board that decides the duty or the responsibility of an employer for primary compensation in an order awarding or denying medical service, medicines, or durable goods by the terms of section 315(1). MCL 418.851; MSA 17.237(851). MCL 418.859a(1); MSA 17.237(859a)(1). MCL 418.861a(1); MSA 17.237(861a)(1).

Section 851, fourth and fifth sentences, allow the Board to redact an order which decided a claim for primary compensation in only one circumstance and during only one period of time. In particular, section 851, fourth and fifth sentences, allow the Board to change a prior order because all parties agree and the agreement conforms with the law by stating that, "[i]f *the parties stipulate* within 30 days to modify or correct errors in the decision issued, the [Board] shall modify or correct errors in the decision in accordance with such stipulations. All such stipulations shall comply with the provisions of this act." (emphasis supplied) Section 851, fourth sentence, describes the only period of time that the Board may consider a stipulation, "[i]f the parties stipulate *within 30 days* to modify or correct errors in the decision issued, the [Board] shall modify or correct errors in the decision in accordance with such stipulations." (emphasis supplied)

Section 859a(1) and section 861a(1) allow the Commission to change an order entered by the Board which resolved a claim for primary compensation. Section 859a(1), second and third sentences, state that, "[a] claim for review shall be filed with the commission not more than 30 days after the date the order of the [Board] or director is sent to the parties. For sufficient cause shown, the [Commission] may grant further time in which to claim a review." Section 861a(1) states that, "[a]ny matter for which a claim for review under section 859a has been filed shall be *heard and decided* by the [Commission]." (emphasis supplied)

The Commission has more latitude than the Board which may only change a Board order as agreed to by the parties. The Commission may reverse or modify the order

of the Board, MCL 418.861a(10); MSA 17.237(861a)(10), or may remand the case to the Board for further explication. MCL 418.861a(12); MSA 17.237(861a)(12). See *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000).

These statutes in the WDCA are entirely consistent by allowing a choice to a party who believes that an order of the Board disposing of the merits of a claim for compensation requires some change. A party has thirty days in which to *either* secure the agreement to change from the other party and present that to the Board by authority of section 851, fourth and fifth sentences, *or* file a claim for review with the Commission by authority of section 859a(1) and section 861a(1). The exercise of one of the two obviates the operation of the other. Securing the agreement from all of the parties for a change in the order of the Board that is required by law and then submitting that stipulation to the Board as allowed by section 851, fourth and fifth sentences, obviates an appeal to the Commission. An appeal to the Commission as allowed by section 859a(1) and section 861a(1) precludes submitting a stipulation. Indeed, section 859a(1), second and third sentences, and section 861a(1) are the particular statutes in the WDCA which codify the principle that a trial court has no authority once an appeal is filed with a reviewing court. *City of Grand Rapids v Coit*, 151 Mich 109; 114 NW 880 (1908). *Scott v Scott*, 255 Mich 663; 239 NW 297 (1931). *Hoffman v Security Trust Co of Detroit*, 256 Mich 383; 239 NW 508 (1931). *Maedel v Wies*, 309 Mich 424; 15 NW2d 692 (1944). *Plastray Corp v Cole*, 324 Mich 433; 37 NW2d 162 (1949). The Court held in *Hoffman, supra*, 386, that,

> "[w]hen the appeal is perfected by seasonable filing of the notice of appeal, the jurisdiction of the appellate court attaches and the trial court has no authority to dismiss the appeal. *Lake Shore & Michigan Southern R. Co. v. Chambers*, 89 Mich. 5; 4 C. J. p. 562. In the instant case, it appears that jurisdiction of the circuit court was conceded at the hearing on motion to dismiss, but such jurisdiction can not be conferred by stipulation."

These are the only ways in which an order of the Board may be changed. Authority for the Board to change an order at the request of one party or sua sponte or after

the expiration of thirty days requires text which is not in any statute of the WDCA and which is not consistent with the actual text in section 851, fourth sentence, allowing a stipulation within thirty days. The Court cannot add text to the WDCA to allow the Board to change an order at the request of one party or sua sponte or after thirty days. *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 625 NW2d 782 (2002). In the case of *Lesner, supra*, 101-102, the Court pronounced that,

> ". . .our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. See, e.g., *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). In other words, the role of the judiciary is not to engage in legislation. *Tyler v Livonia Public Schs*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999)."

Likewise, the authority of the Commission to change an order is with an appeal by one party or both parties, section 859a(1), or an appeal by one party and followed with a cross-appeal from the other within thirty days of service of the brief of appellant. MCL 418.861a(6); MSA 17.237(861a)(6), "[i]n addition to filing its reply brief within the 30 days, the opposing party [appellee] may file a cross appeal and brief in support . . . specifying the findings of fact and conclusions of law in the record that support the position of the party." Again, any other way for the Commission to change an order of the Board requires text which is not in the WDCA that cannot be supplied by the Court. *Lesner, supra.*

The Court of Appeals and the Court may not change an order of the Board because the WDCA allows review and change of the order of the Commission. The Court of Appeals and the Court may not review and perforce, change the order of the Board. *Mudel, supra*, 732, "the judiciary reviews the [Commission] decision, not the [Board] decision."

The circuit court may not review and change an order of the Board. A statute in the WDCA allows a circuit court only the authority to *enforce* an order of the Board. MCL 418.863; MSA 17.237(863).

These statutes apply to preclude any authority of the Board to reconsider the *Barnowsky* I Order. First, the Employee did not submit a stipulation of the Employer to the Board to change the *Barnowsky* I Order within thirty days after the *Barnowsky* I Order was entered. Second, the Employer did file a claim for review with the Commission as allowed by section 859a(1), second sentence, which transferred subject matter jurisdiction from the Board to the Commission. *Hoffman, supra,* 386. Finally, the WDCA disallows the Board authority to redact a decision after the Commission has conducted review and modified or reversed. The WDCA allows the Commission the authority to grant reconsideration to amend an error in its decision, MCL 418.861a(15); MSA 17.237(861a)(15), "[i]f the parties stipulate within 30 days after the decision is rendered to modify or correct errors in the decision, the [Commission] shall modify or correct errors in the decision in accordance with the stipulation. Stipulations shall otherwise comply with the provisions of this act," and the Court of Appeals the authority to consider plenary review. Section 861a(14), second sentence. There is no role for the *Board* authorized by the WDCA after a disposition of a claim for compensation by the Commission.

This consideration has particular application here. The action by the Board in deciding *Barnowsky* III is nothing other than a second review of the *Barnowsky* I Order after the first review which was conducted and concluded by the Commission with the *Barnowsky* II Order and Opinion. The decision by the Board in the *Barnowsky* III Order effectively "trumps" the authority of the Commission allowed by section 861a(1) and courts allowed by section 861a(14), second sentence.

The Court of Appeals was wrong by not applying section 859a(1) and section 861a(1) to establish that the filing of the claim for review by the Employer to appeal

the *Barnowsky* I Order to the Commission ended all power of the Board to change that order. The declaration by the Court of Appeals that the judicial doctrine of res judicata applied fails to recognize that the statutes in the WDCA codified that rule.

The Court of Appeals was wrong in applying the judicial doctrine of res judicata when saying,

> "[t]he [Commission in the *Barnowsky* IV Opinion] held that res judicata prevents the [Board] from ordering payment for mental disability medical treatments in a subsequent order because the [Board] failed to order payment for such treatments in [the] first order [i.e., the *Barnowsky* I Order]. We disagree. The issue was not litigated and decided against [the Employee] in the first action, nor did [the Employee] fail to raise the issue in the first action." *Barnowsky* V, slip op., 3. (30a)

First, res judicata applied to the order of the Commission in the *Barnowsky* II Order which actually changed the order of the Board in the *Barnowsky* I Order. The Court of Appeals was sorely wrong to focus on the decision by the Board in the *Barnowsky* I Order as it did when stating that, "[t]he [Commission in the *Barnowsky* IV Opinion] held that res judicata prevents the [Board] from ordering payment for mental disability medical treatments in a subsequent order *because the [Board] failed to order payment for such treatments in [the] first order.* [i.e., the *Barnowsky* I Order]." *Barnowsky* V, slip op., 3. (emphasis supplied) (30a) The correct focus was on the order of the Commission in the *Barnowsky* II Order because the *Barnowsky* II Order was the last order that disposed of the merits of the claim for primary compensation. That is important here because the Employee could have presented the request to change the *Barnowsky* I Order to the Commission. Indeed, the Employee attempted to change the *Barnowsky* I Order by filing a cross-appeal with the Commission during the appeal that had been filed by the Employer. The Commission observed that the fact of the matter was that the Employee could have and actually did attempt to appeal from the *Barnowsky* I Order,

> "[the Employer] appeals and [the Employee] untimely cross appeals the decision of Magistrate Susan B. Cope, mailed December 16, 1996 [i.e., the *Barnowsky* I Order] granting an

> open award. [The Employee] was voluntarily receiving benefits for shoulder and elbow injuries when . . . return[ing] to 'favored' work, which, [the Employee] contends, led to new injuries: bilateral carpal tunnel syndrome and psychiatric impairment. We modify [the] weekly benefit rate.
>
> The parties state their issues as follows:
>
> [The Employer] states:
>
> > The 1994 weekly benefit tables establish that the weekly workers' disability compensation for the employee is $369.06.
>
> [The Employee] states:
>
> I. Whether the [Board] properly applied MCL 418.301(5)(e) in awarding the [Employee] benefits.
>
> **II. Whether the [Board] erred in not ordering medical treatment for an impairment . . . found to be compensable."** The *Barnowsky* II Opinion, slip op., 1 (emphasis supplied). (15a)

The issue could have been litigated before the Commission in *Barnowsky* II but was not because of the failure of the Employee to preserve it with an appeal or cross-appeal which was filed in time. The Court of Appeals was palpably wrong to declare that, "[t]he issue was not litigated and decided against [the Employee] in the first action," *Barnowsky* V, slip op., 3. (30a)

The Court of Appeals was also wrong by relying on the interpretation of section 315(1), first sentence, in the case of *Kosiel, supra*, which was wrongly decided. Also, *Kosiel, supra*, presented a different situation for applying res judicata than this case. In the case of *Kosiel, supra*, there was a final decree which established the eligibility for a particular medical service, nursing care, and the amount of money required from the employer which a later claim that the amount for that care received after the decree should be increased. The Court held that part of the prior decree could not specify the dollar amount of care provided after the decree.

In this case, the final decree which was the order of the Commission in the *Barnowsky* II Order established that the Employee was not *eligible* for medical care for a mental condition. The Employer was responsible for only care for the physical injury, carpal tunnel syndrome. In the case of *Sokolek v General Motors Corp (On Remand)*, 450 Mich 133; 538 NW2d 369 (1995), the Court recognized that this is a decisive distinction. The Court said in *Sokolek, supra*, 146-147,

> "[t]he hearing referee awarded the plaintiff's compensation, 'subject to cost-of-living increases.' The WCAB held that this provision of the award was, 'unenforceable,' and the Court of Appeals affirmed. We find that our opinion in *Kosiel, supra,* also controls the resolution of this issue.
>
> In *Kosiel,* the magistrate ordered a certain level of compensation, 'until the further order of the Department.' We stated that the order
>
> > did not represent a final determination of the value of nursing services for the duration of plaintiff's life; rather, it contemplated the need to adjust the amount at some point in the future in response to such changes as increases or decreases in wage rates or inflation.
> >
> > * * *
> >
> > Like the statutory standard, the order provides the necessary flexibility to allow a future determination or 'reasonableness' in keeping with the humanitarian objectives that underlie the WDCA. [*Id.* at 381-383.]
>
> Obviously, then, a magistrate is empowered to award cost-of-living increases at a time after a nonfinal determination when such increases are appropriate.
>
> We find that the hearing referee's order in this case served the same permissible purpose as the order in *Kosiel,* to allow the plaintiff's award to evolve as conditions changed. Admittedly, the order in this case is more troublesome, because it provided an award that was not specific or determinable by some set formula. Because this *type* of award is permissible, however, we think it best to remand this aspect of the case to the magistrate, as part of the determination of what compensation is reasonable in this case. We feel that it would be inequitable, as well as contrary to the spirit of our reasoning in *Kosiel,* to hold that the services of the plaintiff's wife must be compensated at a level found to be appropriate in 1985." *Sokolek, supra,* 146-147. (emphasis by the Court)

The claim by the Employee in the *Subsequent Application* is not about the nominal cost of a particular kind of benefit to which the Employee is actually eligible by the *Barnowsky* II Order which is the prior order. Instead, the claim is whether the Employee is actually eligible for a particular kind of benefit, medical service for an emotional condition. *Sokolek, supra,* could apply had the particular kind of benefit actually been allowed by the *Barnowsky* II Order and the subject of controversy now was over the dollar rate charged by the provider or a change of individual provider.

RELIEF

Wherefore, defendant-appellant General Motors Corporation prays that the Court reverse the opinion of the Court of Appeals.

Martin L. Critchell (P26310)
Counsel for Defendant-Appellant

1010 First National Building
Detroit, Michigan 48226
(313) 961-8690